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### Leading The World In The Wrong Direction: Is It Time For The United States To Adopt The World Standard “Loser Pays” Rule In Civil Litigation?

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**LEADING THE WORLD IN THE WRONG DIRECTION:  
IS IT TIME FOR THE UNITED STATES TO ADOPT THE  
WORLD STANDARD “LOSER PAYS” RULE IN  
CIVIL LITIGATION?**

by

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**I. INTRODUCTION**

Although there has long been a debate in the United States as to whether we are an overly litigious society<sup>1</sup>, it is fair to say that the world largely views the United States as the most litigious nation on earth. Not open to debate is the fact that there is a great deal of litigation in the United States every year, and that the number of United States civil litigations (5,806 cases filed per year per 100,000 people) is much higher than in other countries (compared, for example, to other major legal systems such as the U.K. [3,681 cases per 100,000 people], Australia [1,542 cases filed per 100,000 people] and Canada [1,450 cases filed per 100,000 people]).<sup>2</sup>

Concomitantly, it is not surprising that the United States has more lawyers than any other country. Recent estimates show there are more than 1.1 million lawyers in the United States, or one lawyer per 270 residents.<sup>3</sup> Direct comparisons to other countries is difficult for a variety of reasons, including the fact that providers of legal

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services can include non-lawyers such as notaries who provide legal services in many countries around the world. Nevertheless, by any reasonable measure it is clear that both the amount of litigation and the number of lawyers in the United States are robust.<sup>4</sup>

Similarly not surprising is that all of this litigation with all of these lawyers come at substantial cost to litigants in the United States. Costs of tort litigation alone in the United States have risen from \$1.8 billion in 1950 when it represented 0.62 percent of Gross Domestic Product (GDP) to \$148.1 billion in 2009 or 1.74 percent of GDP.<sup>5</sup> Tort costs as a percentage of GDP are significantly higher in the United States than in any other country and have increased steadily from \$1.8 billion (0.62% of GDP) in 1950 to \$260.1 billion by 2004, (representing 2.22% of GDP for that year).<sup>6</sup> Unquestionably such legal costs have been increasing significantly in the United States. The average annual increase in tort costs from 1950-2004 is 9.6% while the average annual increase in GDP for the same time period is 7.1%.<sup>7</sup> As a ratio to economic output, United States tort costs exceed those of other industrialized countries by a sizable margin; with the exception of Italy, which had a tort cost as a percentage of GDP of 1.7% (compared to 2.2% for the United States), other countries have recent tort costs relative to economic output comparable to those in the United States in the 1960s and 1970s.<sup>8</sup> Per capita tort costs in the United States adjusted for inflation have risen by a factor of nearly 10 from 1950 to 2004.<sup>9</sup>

There arguably exist many factors that combine to cause the American explosion of litigation and its attendant costs. A major contributing factor encouraging litigiousness and its resultant costs in the United States is the continued use of the “American Rule” as the general mechanism for assigning the payment of lawyers’ fees. This rule, generally requiring each party to a litigation to bear that party’s respective attorney’s costs, affords plaintiffs little risk in pursuing law suits under the simple calculus that for limited and often estimatable legal fees plaintiffs can instigate and pursue lawsuits which may allow a significant payoff if they win, whereas

defendants also must pay legal fees to minimize the risk of losing, whether they are or are not legally in the wrong.

This approach is in contrast to the so-called “English Rule” that requires the losing party in a civil law suit to reimburse the winning party’s legal costs<sup>10</sup> (this is really the “World Rule” inasmuch as the rest of the world generally follows this rule, as well as in that the “American Rule” is followed only in the United States<sup>11</sup>; which also begs the question: Is the rest of the entire world wrong?), Such a “loser pays” rule as otherwise used world wide appears to have the advantage of eliminating the plaintiffs’ incentive for bring suits that may in fact be dubious.

This article examines the history and contemporary application of the American Rule, with an eye toward assessing whether American justice might better and more cost effectively be served by a change to a “Loser Pays” system like that presently used in England, and around the globe.

## **II. BRIEF BACKGROUND ON ATTORNEY-FEE SHIFTING**

The “United States Rule” that each party to litigation should, in the absence of a statute to the contrary, bear the cost of its own legal costs is well ingrained in our system. The losing party in civil litigation in federal courts is generally assessed court costs in both trial and appellate cases.<sup>12</sup> The state rules generally parallel the federal rule with few exceptions.<sup>13</sup>

But this was not always the case in the United States. Originally, colonial America adopted the English Rule and allowed the prevailing party to collect attorney’s fees from the losing party.<sup>14</sup> In migrating to and then maintaining the American Rule the most often cited rationale was enhancing access to justice—a concern that a “loser pays” system may discourage aggrieved parties from pursuing legal remedies in the courts out of fear of having to pay not only their own attorney’s fees, but also those of the defendant if they lose.<sup>15</sup> Of note, however, is that contrary to the oft stated rationale, the English Rule (again, more

accurately the “World Rule”) was not adopted in the United States after its independence from England because of any concern about access to justice, but rather out of a desire by lawyers to not be limited to the statutory compensation provided for under the old statutes.<sup>16</sup> The English Rule was abandoned along with the low statutory limits on lawyer’s fees, effectively allowing lawyers to charge higher fees but removing the requirement that the loser pay both his/her attorney’s fees along with those of the prevailing party in civil suits.<sup>17</sup>

The genesis of the American Rule as a means of maximizing the profitability of a law practice is a useful fact to keep in mind when evaluating the relative merits of the American Rule versus the World Rule.

### **III. WHO BENEFITS FROM THE AMERICAN RULE?**

In the debate over the relative merits of the American Rule over the English/World Rule, access to justice is a primary argument advanced for maintaining the *status quo*. If “loser pays” is adopted, the argument goes, plaintiffs, in particular those of limited means, will be dissuaded from asserting their rights in court for fear of having to pay the potentially high attorneys’ fees of the prevailing party.<sup>18</sup> But commentators have also argued that this American no-indemnity rule “is a practice of the bar that worked for it and not a solution consciously chosen to meet ideals of access to justice. The latter . . . is an after the fact rationalization.”<sup>19</sup> With each party having to bear the cost of their attorney’s fees, there is little risk for plaintiffs to assert weak claims in the hope of extracting a settlement from defendants who know that defending such suits can be more costly than settling even when they have a high probability of success at trial.<sup>20</sup> The American rule can also makes many, and some argue most, legal victories Pyrrhic ones because unreimbursed legal fees can be greater than the actual judgment a winning plaintiff obtains at trial.<sup>21</sup>

The results are even worse for defendants who when faced with determined plaintiffs with weak or inflated claims have the unsavory choice to either settle such claims or litigate them in court where they will eventually prevail but be left to pay their own lawyers' fees in addition to the inconvenience and frustration of having to litigate such claims. A notorious case in point is that of a Washington D.C. plaintiff suing a dry cleaner for \$67 million for the loss of a pair of pants.<sup>22</sup> The plaintiff, a Washington D.C. administrative law judge, eventually reduced his suit to \$54 million for pants lost by the dry cleaners; the ensuing litigation which dragged on for more than two years and cost the defendants in excess of \$100,000 eventually led to their closing down the business, even though fundraisers and local donations helped defray most of the defendant's litigation costs.<sup>23</sup>

Where is the justice for this defendant under the American Rule? This is a result that could only happen in the United States and the fact that it is rare must be of little consolation to the Chung family who have no recourse in law after prevailing in court in a case that clearly illustrates the potential for abuse made possible by the American custom that each litigant should be responsible for his/her own legal fees.<sup>24</sup> Although an extreme example, the design of the American system allows for many lesser unpublicized but still significant obstacles to justice.

#### **IV. CURRENT FEE SHIFTING IN THE UNITED STATES**

Under our current system, court costs and attorney's fees are treated differently. The losing party pays all court costs with only rare exceptions in federal courts for both trials and appeals.<sup>25</sup> Costs include modest witness fees, but do not generally include compensation of expert witnesses.<sup>26</sup> And attorney's fees are awarded only under exceptional circumstances such as when a statute allows for reimbursement of legal fees or when a court finds that a lawsuit was brought in bad faith. Since the 1970's, the number of federal statutes that allow for attorney's fee awards have increased dramatically.<sup>27</sup> Since the first federal fee-shifting statute in 1870 that required awarding attorneys' fees to the prevailing plaintiffs at trial in cases involving federal civil rights

acts, the practice has become more common at the federal and state levels.<sup>28</sup> The number of statutes allowing the award of attorney's fees to prevailing plaintiffs increased from 30 in 1975 to approximately 150 in 1983.<sup>29</sup>

### ***A. Federal Examples of Loser Pays Rules***

#### ***1. Federal Offer of Judgment Rules:***

Rule 68 of the Federal Rules of Civil Procedure contains an offer of judgment provision that was intended to clear the congested federal dockets by promoting settlement and avoiding protracted litigation.<sup>30</sup> The drafters intended to allow defendants who made an offer of judgment to a plaintiff to recover their post-offer costs when the plaintiff rejected the offer, proceeded to trial, and prevailed, but received a judgment less favorable than the offer.<sup>31</sup> This rule provided the defendant with an incentive to make a serious offer in order to invoke the effects of the rule and plaintiffs were given an incentive to seriously consider accepting the offer or risk penalties for choosing unwisely to continue litigation after a settlement offer was made.<sup>32</sup> However, only the Eleventh and Fourth Circuits have interpreted Rule 68 to allow for the reimbursement of both court costs and attorney's fees incurred by the prevailing party after a settlement offer is rejected if the subsequent award is less than the settlement offer.<sup>33</sup>

#### ***2. The Equal Access to Justice Act:***

Originally passed by Congress in 1980<sup>34</sup>, the Equal Access to Justice Act is intended to permit certain parties, particularly individuals and small businesses,<sup>35</sup> to challenge unreasonable federal government actions, by allowing federal courts to award attorney's "fees and [other] expenses<sup>36</sup> to certain prevailing parties in certain actions involving the federal government<sup>37</sup>.

The Act's two main provisions generally allow for recovery of reasonable attorney's fees and other costs in administrative proceedings<sup>38</sup> and civil lawsuits<sup>39</sup>, respectively. An award will be made unless the adjudicating officer or court finds that the position

of the United States was substantially justified, or that special circumstances exist that would make such an award unjust<sup>40</sup>.

While the Act is “one sided” in that it permits only the non-government litigant the possibility of collecting by enforcing “loser pays” against the government, like the numerous other federal fee shifting rules, the Equal Access to Justice Act provides at least some relief similar to that provided under the English Rule

***B. States with Loser Pays Rules***

Some states provide fee shifting or loser pays rules under certain circumstances by statute. Although the circumstances under which fee-shifting to the losing party can occur vary and, with the exception of Alaska are quite modest, a brief overview of some of these “loser pays” provisions may be instructive.

***1. Alaska:***

The State of Alaska allows courts to compensate prevailing parties for attorneys’ fees and authorizes the Alaska Supreme Court to determine by rule or order the costs that may be awarded in civil actions to prevailing parties.<sup>41</sup> Courts are granted the discretion to abate in whole or in part the awarding of attorneys’ fees in cases involving the United States Constitution or the Constitution of the State of Alaska.<sup>42</sup> Prevailing parties in civil actions are generally entitled to receive an award for attorneys’ fees to parties awarded money judgments under the following schedule:<sup>43</sup>

| <b>Judgment and, if awarded, Prejudgment Interest</b> | <b>Contested with Trial</b> | <b>Contested without Trial</b> | <b>Non-Contested</b> |
|---|-----------------------------|--------------------------------|----------------------|
| First \$ 25,000                                       | 20%                         | 18%                            | 10%                  |
| Next \$ 75,000  | 10%                         | 8%                             | 3%                   |
| Next \$400,000  | 10%                         | 6%                             | 2%                   |
| Over \$500,000  | 10%                         | 2%                             | 1%                   |



In a case in which the prevailing party recovers no money judgment, the prevailing party is entitled to receive 30 percent of reasonable actual attorney's fees which were necessarily incurred if the case goes to trial, and 20 percent of its actual attorney's fees which were necessarily incurred if the case is resolved without going to trial.<sup>44</sup> Courts are given the authority to vary the legal fees awarded under the noted formula if they believe varying the fees is warranted after weighing a variety of criteria enumerated in the statute.<sup>45</sup> Thus, judges are provided significant discretion to raise or lower legal fees awarded under the statute to ensure that they are equitable on a case by case basis.

## **2. *California:***

California provides limited “loser pays” provisions in cases involving “unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful.”<sup>46</sup> Under California law, consumers who prevail in an action arising out of an unfair method of competition or deceptive business practice are entitled to recover both court costs and attorney’s fees.<sup>47</sup> Prevailing defendants in such actions may also recover court costs and reasonable attorney’s fees if a court finds that the plaintiff brought the action in bad faith.<sup>48</sup>

California also allows partial attorney’s fees to be awarded (capped at \$75 per hour with discretion given the trial court to raise the amount based on cost of living or limited availability of counsel<sup>49</sup>) in cases brought by or against the state related to the determination, collection, or refund of any tax, interest, or penalty in any court of record in the state.<sup>50</sup>

An offer of judgment provision is also available under California law that requires a plaintiff who rejects an offer of judgment to pay the defendant’s post-offer court costs and post-offer attorney’s fees if the offer of judgment is rejected the plaintiff subsequently obtains at trial a judgment that is less than the defendant’s settlement offer.<sup>51</sup>



### **3. *Florida:***

Florida adopted the English Rule for medical malpractice cases in 1980 and required the losing party to pay all of the prevailing party's litigation expenses, including attorney's fees, but repealed the fee-shifting provisions five years later with inconclusive results.<sup>52</sup>

Like California and several other states, Florida has an offer of settlement provision that requires a plaintiff to pay a portion of the defendant's attorney's fees if a court determines that a settlement offer is rejected unreasonably.<sup>53</sup> Under the Florida statute, "[a]n offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected."<sup>54</sup> Unreasonable rejection of a settlement offer will require payment of the court costs, expenses and reasonable attorney's fees incurred by the other party after the settlement offer was rejected.<sup>55</sup>

### **4. *Illinois:***

Under its Consumer Fraud and Deceptive Business Practices Act, Illinois allows a court to award reasonable attorney's fees in addition to court costs to the prevailing party in civil actions for consumer fraud and deceptive business practices.<sup>56</sup>

### **5. *New York:***

As part of its consumer protection laws, New York allows a court to assign reasonable attorney's fees to the prevailing plaintiff in civil actions involving deceptive business acts and practices.<sup>57</sup> Attorney's fees may also be awarded by a court to the prevailing party, other than the state, for civil action brought against the state, unless the court finds that the position of the state was

substantially justified or that special circumstances make an award unjust.<sup>58</sup>

#### **6. *Oklahoma:***

Oklahoma makes the losing party in a wide range of civil actions responsible for the prevailing party's attorney's fees through separate statutory provisions. A sampling of these areas include property line disputes;<sup>59</sup> livestock liens;<sup>60</sup> actions for injunctive relief to prevent the unlawful use of a lender's name, trade name or trademark;<sup>61</sup> actions to enforce visitation agreements;<sup>62</sup> actions for labor or services rendered or on certain accounts, bills and contracts;<sup>63</sup> and actions involving the unauthorized use of a deceased personality's right of publicity<sup>64</sup> among many others.

#### **7. *Oregon:***

Oregon allows for a court to award reasonable attorneys' fees to a prevailing plaintiff in certain small claims in tort where the amount in controversy does not exceed \$7,500 if a demand for payment was made at least 30 days prior to the commencement of the action by the plaintiff of the defendant or the defendant's insurance company.<sup>65</sup> No attorneys' fees may be awarded, however, if a settlement offer was made by the defendant before the action was commenced that is the same or more than the final judgment obtained in court.<sup>66</sup> Defendants may also be awarded reasonable attorneys' fees for successful counterclaims for amounts of \$7,500 or less.<sup>67</sup>

Reasonable attorneys' fees may also be awarded a prevailing plaintiff In any action for damages for breach of an express or implied warranty in a sale of consumer goods or services where the amount pleaded is \$ 2,500 or less if the court finds that written demand for the payment of such claim was made on the defendant not less than 30 days before commencement of the action and that the defendant was allowed within that 30 days reasonable opportunity to inspect any property pertaining to the claim.

However, attorneys' fees are not available if the defendant tendered a settlement offer to the plaintiff, prior to the commencement of the action of an amount not less than the damages awarded to the plaintiff at trial.<sup>68</sup> Prevailing defendants may also be awarded reasonable attorneys' fees if the action is found to have been frivolous.<sup>69</sup>

Oregon also allows the award of reasonable attorney's fees to prevailing plaintiffs (and prevailing defendants if the action is deemed to be frivolous) in cases involving unlawful discrimination in both court and administrative proceedings;<sup>70</sup> in actions for intimidation;<sup>71</sup> in actions for trade discrimination;<sup>72</sup> and in civil actions for involuntary servitude or trafficking in persons.<sup>73</sup> Oregon also provides for the award of reasonable attorneys' fees to prevailing plaintiffs in a range of other actions, including: the award of liquidated damages to sports official subjected to offensive physical contact;<sup>74</sup> the sale or successful solicitation of sale of securities in violation of Oregon Securities Law;<sup>75</sup> injury to or removal of produce, trees or shrubs;<sup>76</sup> discrimination in renting housing because of assistance animal (attorneys' fees may be awarded to the prevailing plaintiff or to the prevailing defendant if the plaintiff's case is determined to be frivolous);<sup>77</sup> in actions by employees to collect wages not paid within 48 hours (excluding weekends) of the time they become due;<sup>78</sup> unlawful discrimination in employment, public accommodations and real property transactions (attorney fees awardable to the prevailing party);<sup>79</sup> actions to recover on insurance policies or contractor's bond unpaid within six months where settlement is not made within six months of proof of loss (defendants may recover a reasonable amount towards their attorneys' fees if a settlement offer rejected by a plaintiff is the same or larger than the ultimate judgment obtained at trial);<sup>80</sup> and, among others, unlawful trade practices (prevailing defendants may also be awarded attorneys' fees when a court finds the plaintiff's case to be frivolous).<sup>81</sup>

## 8. *Texas:*

Texas imposes an offer of settlement system that can make parties who reject an offer liable for a portion of the prevailing party's attorneys' fees under certain circumstances. The offer of settlement under Texas Rules of Civil Procedure<sup>82</sup> Rule 167 must be invoked by the defendant by filing a declaration invoking the rule within 45 days of the case being set for trial.<sup>83</sup> Once invoked, Rule 167 provides that if an offer is rejected and the judgment entered is significantly less favorable than the settlement offer, then the prevailing party whose offer was rejected is entitled to be reimbursed for the litigation costs incurred after the offer was made.<sup>84</sup> A judgment award on monetary claims is defined as significantly less favorable than an offer to settle those claims if the offeree is a claimant and the judgment would be less than 80 percent of the offer, or if the offeree is a defendant and the judgment would be more than 120 percent of the offer.<sup>85</sup> Litigation costs are defined to include court costs, reasonable fees for not more than two testifying expert witnesses, and reasonable attorney fees.<sup>86</sup> The litigation costs that may be awarded under the rule cannot exceed the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment minus the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.<sup>87</sup> In addition, the rule does not apply to a class action, a shareholder's derivative action, an action by or against the State, a unit of state government, or a political subdivision of the State, an action brought under the Family Code, an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code, or an action filed in a justice of the peace court or small claims court.<sup>88</sup>

## V. WHAT IS THE LIKELY IMPACT OF ADOPTING THE WORLD RULE OVER THE AMERICAN RULE?

In sum, the oft cited argument in defense of the American Rule is that loser pays systems will have a chilling effect on plaintiffs' willingness to assert their lawful claims in court for fear

of having to pay the defendant's costs if they do not prevail in court.<sup>89</sup> This position is combined with the fear that requiring payment of the prevailing party's legal fees can have a chilling effect on individuals of limited means asserting valid claims in court for fear of losing and having to bear not only their own legal expenses, but also those of the winning party.<sup>90</sup> Critics of the American Rule counter that having to pay for one's own legal expenses can also prevent plaintiffs with limited means from using the courts to settle valid claims and provides an advantage to litigants with superior resources.<sup>91</sup> These critics also note that it fails to fully compensate successful plaintiffs for their losses since they must unjustly pay their lawyers to receive that to which they are legally entitled to.<sup>92</sup>

In fact there is little disincentive for individuals under the American System to refrain from pursuing cases with little merit in the courts for their nuisance value since settling such cases can be far less costly for defendants regardless of their merit. Although current data on national and regional average hourly rates charged by lawyers is hard to come by, one recent survey of 250 national firms found the average rate charged by these firms to be \$372 per hour.<sup>93</sup> Legal advice is expensive, and litigation more so. It is generally accepted that only 2-3 percent of civil cases in the United States proceed to a verdict;<sup>94</sup> the rest are settled or abandoned before a judgment is entered.<sup>95</sup>

Although reliable statistics are not available on the number of civil cases settled in the United States every year, most commentators often cite settlement figures of 90% or more.<sup>96</sup> The high cost of litigation no doubt encourages settlement of cases under the American Rule, especially those of relatively low value as the cost of defending against these in the courts can be high. Indeed, it is not unusual for the combined legal bills of litigants to equal or exceed the amounts in controversy in litigated cases.<sup>97</sup> It is understandable, then, that many defendants faced with the unsavory choice of settling a low-merit claim or paying a significantly higher amount in attorneys' fees to defend in court will often choose expediency over justice and settle a weak claim.

## VI. CONCLUSION

It is not possible to predict with certainty the effect of adopting a “loser pays” system in the United States. Replacing the American Rule with the World Rule would likely reduce the number of claims with questionable merit as plaintiffs faced with the prospect of having to pay the defendant’s legal fees should they not prevail in court would be less likely to bring such cases in the first instance. Likewise, it stands to reason that fewer questionable claims would be settled by defendants unburdened by having to pay their own legal costs in cases when they are likely to prevail in court. But even if this were not the case, there is still a compelling reason to abandon the American Rule: Fundamental fairness. In bringing legal action, a plaintiff subjects a defendant to legal costs and significant inconvenience that a defendant can only avoid by capitulating to the plaintiff’s claims. The American Rule requires each party, regardless of the merits of their case, to bear their own legal expense simply because it is the established practice that they should do so. This practice can victimize both virtuous plaintiffs and defendants by requiring them to bear the cost of prevailing in court while at the same time rewarding unreasonable plaintiffs and defendants by allowing them to use the cost of litigation as leverage to exact advantageous settlements to which they have little legal claim.

Valid concerns about preserving access to justice can be addressed within the context of a loser pays system in various ways. Both the federal government and states could follow Alaska’s lead and adopt a system that awards attorneys’ fees based on a sliding scale as a percentage of judgments obtained at trial. Exceptions can be carved out awarding attorneys’ fees to prevailing parties, such as in matters relating to family law, civil rights, or class actions. Courts can also be given the right to refuse claims for attorneys’ fees for compelling reasons under their equity powers when justice requires it.

While American exceptionalism may justify standing in opposition to the rest of the world when there is just cause, the



American Rule seems to offer little more by way of compelling justification in the final analysis than a custom and tradition whose only clear beneficiaries are the lawyers who thrive in a country with the dubious distinction of being universally acknowledged as the most litigious nation on earth.

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<sup>1</sup> See generally Marc Galanter, "The Day After the Litigation Explosion," 46 Md. L. Rev. 3 (Fall, 1986); Deborah L. Rhode, "Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution," 54 Duke L.J. 447 (November, 2004).

<sup>2</sup> J. Mark Ramseyer & Eric B. Rasmusen, "Comparative Litigation Rates," Harvard John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 681, 5 (November 2011). Available online at [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Ramseyer\\_r\\_681.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_r_681.pdf) (Last accessed March 11, 2012).

<sup>3</sup> Charles N. W. Keckle, "Lawyer UP: A Book Review Essay," 27 T.M. Cooley L. Rev. 57, 74 (Hilary Term, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> Towers Watson, *2010 Update on U.S. Tort Cost Trends*, at 3 (available online at <http://www.towerswatson.com/assets/pdf/3424/Towers-Watson-Tort-Report-1.pdf> (last accessed January 29, 2012).

<sup>6</sup> Towers Perrin Tillinghast, U.S. Tort Costs and Cross-Border Perspectives: 2005 Update at 6 (2005) available at [http://www.towersperrin.com/tillinghast/publications/reports/2005\\_Tort\\_Cost/2005\\_Tort.pdf](http://www.towersperrin.com/tillinghast/publications/reports/2005_Tort_Cost/2005_Tort.pdf) (Last accessed March 11, 2012).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> See generally John F. Vargo, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice," 42 Am. U.L. Rev. 1567 (Summer, 1993) for a discussion of the genesis of the American Rule and English Rule (arguing in favor of the American Rule).

<sup>11</sup> *Id.* at 1598

<sup>12</sup> See James R. Maxeiner, *Section II.C: Civil Procedure: Cost and Fee Allocation in Civil Procedure*, 58 Am. J. Comp. L. 195, 197 (2010) (noting that court costs are generally payable by the losing party in federal courts, but not expert witness fees or attorneys' fees absent statutes directing awards and a few judge-made exceptions).

<sup>13</sup> *Id.* at 196.

<sup>14</sup> Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 Fl. Coastal Law Rev. 357, 365-66 (Winter, 2011)

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(quoting Jennifer M. Smith, *Credit Card, Attorney's Fees, and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win the Battle But Nevertheless Lose the War*, 61 ME. Law Rev. 171, 187).

<sup>15</sup> See, e.g., John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U.L. Rev. 1567 (Summer 1993).

<sup>16</sup> *Id.* at 1574

<sup>17</sup> *Id.*

<sup>18</sup> See generally Deborah L. Rhode, *Too Much law, Too Little Justice: Too much Rhetoric, Too Little Reform*, 11 Geo. J. Legal Ethics 989, 1005 (1998).

<sup>19</sup> Maxeiner, *supra* note 12 at 218

<sup>20</sup> See generally Marie Gryphon, *Assessing the Effects of a "Loser Pay" Rule on the American Legal System: an Economic Analysis and Proposal for Reform*, 8 Rutgers J.L. & Pub. Pol'y 567 (Spring 2011).

<sup>21</sup> *Id.* at 569.

<sup>22</sup> Lubna Takruri, *\$54 million 'pant suit' runs cleaners out of business*, The Associated Press, Washington, September 20, 2007, at A2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Maxeiner, *supra* note 12 at 198 (referencing Fed. R. Civ. P. 54(d)(1) and Fed. R. App. P. 39).

<sup>26</sup> *Id.*

<sup>27</sup> Jeff Holth, *I Win, You Pay: Considerations of Efficiency and Fairness in Minnesota Appellate Litigation of Attorney's Fees*, 37 Wm. Mitchell L. Rev. 267, 270 (2010).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Daniel Glimcher, *LEGAL DENTISTRY: HOW ATTORNEY'S FEES AND CERTAIN PROCEDURAL MECHANISMS CAN GIVE RULE 68 THE NECESSARY TEETH TO EFFECTUATE ITS PURPOSES*, 27 Cardozo L. Rev. 1449, 1453 (2006).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1471-1474.

<sup>34</sup> Pub. L. No. 96-481, 94 Stat. 2325 (1980)

<sup>35</sup> Generally individuals whose net worth do not exceed \$ 2,000,000 and any owner of an unincorporated business, partnership, corporation, association, unit of local government, or organization, whose net worth does not exceed \$ 7,000,000 and which had no more than 500 employees at the time the adversary adjudication was initiated (5 U.S.C. § 504 (b) (1) (B) for administrative actions and (28 U.S.C. § 2412 (d) (2) (B) for court actions)

<sup>36</sup> "Fees and other expenses" include the reasonable expenses of expert witnesses, studies, analyses, engineering reports, tests, and projects found

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by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. The amount of fees awarded are based upon prevailing market rates for the kind and quality of the services furnished, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States and attorney fees shall not be awarded in excess of \$ 125 per hour unless the court determines that special circumstances justify a higher fee. initiated (5 U.S.C. § 504 (b) (1) (A) for administrative actions and (28 U.S.C. § 2412 (d) (2) (A) for court actions)

<sup>37</sup> See H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 5-6 (1980), reprinted in 1980 U.S. Code Cong. & Admin News 4984

<sup>38</sup> 5 U.S.C. § 504 (a) (1)

<sup>39</sup> 28 U.S.C. § 2412 (d) (1) (A)

<sup>40</sup> 5 U.S.C. § 504 (a) (1) and 28 U.S.C. § 2412 (d) (1) (A), respectively

<sup>41</sup> Alaska Stat. § 09.60.010(a) (2012)

<sup>42</sup> See Alaska Stat. § 09.60.010(c)-(e) (2012)

<sup>43</sup> See Alaska Rules of Civ. Proc. Rule 82 (a)-(b) available at <http://courts.alaska.gov/civ2.htm#79> (Last accessed February 24, 2012).

<sup>44</sup> Alaska Rules of Civ. Proc. Rule 82 (b)(2). available at <http://courts.alaska.gov/civ2.htm#79> (Last accessed February 24, 2012).

<sup>45</sup> Alaska Rules of Civ. Proc. Rule 82 (b)(3)(A)-(K). available at <http://courts.alaska.gov/civ2.htm#79> (Last accessed February 24, 2012).

The specific enumerated criteria in this subparagraph that judges may weigh in assessing legal fees different from those provided for in the statute include the following: (A) the complexity of the litigation; (B) the length of trial; (C) the reasonableness of the attorneys' hourly rates and the number of hours expended; (D) the reasonableness of the number of attorneys used; (E) the attorneys' efforts to minimize fees; (F) the reasonableness of the claims and defenses pursued by each side; (G) vexatious or bad faith conduct; (H) the relationship between the amount of work performed and the significance of the matters at stake; (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts; (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and (K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.)

<sup>46</sup> See Cal Civ Code § 1770(a)(1)-(22) (2012) for a listing of unfair business competition and unfair or deceptive business practices.

<sup>47</sup> Cal Civ Code § 1780(e) (2012).

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<sup>48</sup> *Id.*

<sup>49</sup> Cal Rev & Tax Code § 7156(C)(iii) (2012)

<sup>50</sup> Cal Rev & Tax Code § 7156(a) (2012).

<sup>51</sup> Cal Code Civ Proc § 998(c)(1) (2012).

<sup>52</sup> *See generally* Christopher R. McLennan, "The Price of Justice: Allocating Attorneys' Fees in Civil Litigation," 12 Fl. Coastal L. Rev. 357 at 382.

<sup>53</sup> Fla. Stat. § 45.061(2) (2012).

<sup>54</sup> *Id.*

<sup>55</sup> Fla. Stat. § 45.061(3)(a) (2012).

<sup>56</sup> 815 ILCS 505/10a (b)(2012).

<sup>57</sup> NY CLS Gen Bus § 349(h) (2012).

<sup>58</sup> NY CLS CPLR § 8601(a) (2011). *See also* NY CLS CPLR § 8602(b) (2011).

<sup>59</sup> 4 Okl. St. § 150.1 (2012).

<sup>60</sup> 4 Okl. St. § 201.10 (2012).

<sup>61</sup> 6 Okl. St. § 1418 (2012).

<sup>62</sup> 10 Okl. St. § 7505-1.5 (2012).

<sup>63</sup> 12 Okl. St. § 936 (2012).

<sup>64</sup> 12 Okl. St. § 1448 (2012).

<sup>65</sup> ORS § 20.080(1) (2010).

<sup>66</sup> *Id.*

<sup>67</sup> ORS § 20.080(2) (2010).

<sup>68</sup> ORS § 20.098(1) (2010).

<sup>69</sup> ORS § 20.098(2) (2010).

<sup>70</sup> ORS § 20.107(1) (2010).

<sup>71</sup> ORS § 30.198(3) (2009).

<sup>72</sup> ORS § 30.860 (2009).

<sup>73</sup> ORS § 30.867 (2009).

<sup>74</sup> ORS § 30.882 (2009).

<sup>75</sup> ORS § 59.115 (2009).

<sup>76</sup> ORS § 105.810 (2009).

<sup>77</sup> ORS § 346.690 (2009).

<sup>78</sup> ORS § 652.200 (2009).

<sup>79</sup> ORS § 659A.885 (2009).

<sup>80</sup> ORS § 742.061 (2009).

<sup>81</sup> ORS § 646.638 (2009).

<sup>82</sup> Available online at

[http://www.supreme.courts.state.tx.us/rules/trcp/rcp\\_all.pdf](http://www.supreme.courts.state.tx.us/rules/trcp/rcp_all.pdf) (Last accessed March 4, 2012).

<sup>83</sup> Tex. R. Civ. P. 167.2(a) (2012).

<sup>84</sup> Tex. R. Civ. P. 167.4(a) (2012).

<sup>85</sup> Tex. R. Civ. P. 167.4(b) (2012).

<sup>86</sup> Tex. R. Civ. P. 167.4(c) (2012).

<sup>87</sup> Tex. R. Civ. P. 167.4(d) (2012).

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<sup>88</sup> Tex. R. Civ. P. 167.1(a)-(f) (2012).

<sup>89</sup> See generally John F. Vargo, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice," 42 Am. U.L. Rev. 1567 (Summer 1993);

<sup>90</sup> Christopher R. McLennan, "The Price of Justice: Allocating Attorneys' Fees in Civil Litigation," 12 Fl. Coastal L. Rev. 357, 367-367 (Winter 2011).

<sup>91</sup> *Id.* at 368.

<sup>92</sup> *Id.*

<sup>93</sup> 2009 Law Firm Billing Survey, The National Law Journal, December 7, 2009 available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202436068099&slreturn=1&hbxlogin=1> (Last accessed March 18, 2012).

<sup>94</sup> John Barkai, Elizabeth Kent, and Pamela Martin, "Settling Civil Lawsuits in the Hawaii Circuit Courts," 10 Hawaii B.J. 1 (2007).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Maxeiner, *supra* note 12 at 200.